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No. 07-440

In the Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TX,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, COLORADO, HAWAII, IOWA, MAINE, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND UTAH, VIRGINIA AND OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the Fifth Circuit correctly hold that the Sixth Amendment right to counsel did not attach at Petitioner's Article 15.17 magistration because the State of Texas had not yet committed itself to prosecute Petitioner and, therefore, adversary judicial proceedings had not yet commenced?

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INTEREST OF *AMICI CURIAE*

Amici, the State of Texas and 17 other States and Puerto Rico, have an interest in ensuring that their courts make appointments of counsel when required to do so by the Sixth Amendment to the United States Constitution. The *amici* States also have an interest in ensuring that their courts are not compelled to appoint counsel when the Sixth Amendment does not require appointment, so as to avoid frustrating the criminal investigatory process and the unnecessary expenditure of the States' resources. Given the significance of the Sixth Amendment right to counsel, the States have a substantial interest in ensuring that it is accorded its proper scope.

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel, by its terms, protects the "accused" in "[a]ll criminal prosecutions." Thus, it guards against unfair trials, and against the possibility that a person unfamiliar with the law could be forced to defend himself in court against learned adversaries from the State. And, even earlier, it applies to critical stages of the prosecution to ensure that the accused's rights at trial are not unfairly prejudiced by uncounseled conduct pretrial.

The desideratum of the right to counsel is not safeguarding the liberty interests of the accused pretrial, nor is it effectuating speedy trials or providing a vigorous pretrial investigator. Instead, the object of the Sixth Amendment right to counsel is, singularly, preventing an unfair criminal prosecution.

Accordingly, the Sixth Amendment right to counsel does not arise until the government commits itself to prosecute the individual. And even then, the right has no application outside the critical stages in the

prosecution—those that might impact the ultimate outcome at trial.

The Court has long explained that the "purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . ." *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). Therefore, a person's "right to counsel attaches *only at or after* the time that adversary judicial proceedings have been initiated against him." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (emphasis added). The focus is on the initiation of adversary proceedings because "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.*, at 689. "It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.*, at 690.

The initial question facing the Court in this case is whether adversary judicial proceedings had commenced against Petitioner, that is, whether the State of Texas had committed itself to prosecute Petitioner at the time of his Article 15.17 magistration. *See* TEX. CODE CRIM. PROC. art. 15.17. By any measure, the answer to that question is no.

In Texas only a prosecutor can commit the State to prosecute a felony offense. Because there is no evidence that any prosecutor had knowledge of or any involvement in the matter at the time Petitioner appeared before a justice of the peace and received his statutory warnings under Article 15.17 of the Texas Code of Criminal

Procedure, Petitioner's right to counsel did not attach at that time.

Petitioner asserts that two cases decided by the Court, *Brewer* v. *Williams*, 430 U.S. 387 (1977), and *Michigan* v. *Jackson*, 475 U.S. 625 (1986), establish that adversary judicial proceedings were initiated though the probable-cause determination, statutory warnings, and setting of bail at the Article 15.17 magistration. Petitioner's reliance on these two cases is misplaced. In each case, the Court looked to language from *Kirby* that an "arraignment" is one of the ways in which judicial proceedings may be commenced. Because, in both *Brewer* and *Jackson*, the defendants had been "arraigned," the Court did not dwell on the question further, and instead moved on to the question of waiver. Here, there is no dispute that, under Texas law, Petitioner had not yet been arraigned, and Petitioner's argument that his Article 15.17 magistration should be treated as the functional equivalent of a formal arraignment is belied by the administrative nature of the proceeding, the lack of adversarial questioning (or even a prosecutorial adversary), and the absence of a plea or any other inquiry that could prejudice any subsequent trial.

In the alternative, even if the right to counsel had attached at the Article 15.17 magistration, the Court should hold that Petitioner's right to counsel was not violated because he was never exposed to a critical stage in his prosecution without the assistance of counsel. Petitioner concedes that he was not entitled to counsel at the Article 15.17 magistration itself, and he suggests no other event at which his constitutional interest in a fair trial might have been implicated. That omission is fatal

to his claim. Therefore, the judgment of the Fifth Circuit should be affirmed.

ARGUMENT

I. ROTHGERY'S RIGHT TO COUNSEL DID NOT ATTACH FOLLOWING HIS ARTICLE 15.17 MAGISTRATION BEFORE A JUSTICE OF THE PEACE.

The Sixth Amendment right to counsel, which exists to protect an accused from unfair conviction as a result of his ignorance of the law, does not attach until adversary judicial proceedings have been initiated, that is, until the government has made a commitment to prosecute. Under Texas law, the State could not commit to prosecute Petitioner for a felony without the involvement of a prosecutor. Given the absence of prosecutorial knowledge or involvement in the matter at the time of the Article 15.17 magistration, the Fifth Circuit correctly held that the State of Texas had not yet committed to prosecute Petitioner and, therefore, no Sixth Amendment right to counsel had attached.

A. The Sixth Amendment Right to Counsel Exists to Protect an Accused from Conviction Resulting from Ignorance of His Legal and Constitutional Rights.

"The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.'" *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). In *Johnson* v. *Zerbst*, the Court explained that this guarantee exists to protect the interests of the accused—who are not familiar with the law—in receiving a fair trial:

> "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel . . . . The '* * * right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'" 304 U.S. 458, 462-463 (1938) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)).

Without this "guiding hand of counsel," although an individual "be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U.S., at 69.

The Court has "recognized that the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *Gouveia*, 467

U.S., at 188-189 (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)). The Court has also extended the right to counsel to "'critical' pretrial proceedings . . . recognizing that at those proceedings, the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, . . . in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Gouveia*, 467 U.S., at 189 (quoting *Ash*, 413 U.S., at 310 and *United States* v. *Wade*, 388 U.S. 218, 224 (1967)). Thus, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . ." *Johnson*, 304 U.S., at 465. The Court has repeatedly reaffirmed that purpose.[1]

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1. Numerous Court decisions have reaffirmed the principle that the Sixth Amendment right to counsel exists to protect an individual from ultimately being wrongfully convicted as a result of his inadequate knowledge of the law. For example, in *Moran* v. *Burbine* the Court observed as follows:

> "[The Sixth Amendment's purpose] is to assure that in any criminal prosecutio[n] . . . the accused shall not be left to his own devices in facing the prosecutorial forces of organized society . . . By its very terms, it becomes applicable only when the government's role shifts from investigative to accusation. For it is only then that the assistance of one versed in the intricacies of the law . . . is needed to assure that the prosecution's case encounters the crucible of meaningful adversarial testing." 475 U.S. 412, 430 (1986) (internal quotations omitted).

See also Evitts v. *Lucey*, 469 U.S. 387, 394 n.6 (1985) ("Our cases dealing with the right to counsel—whether at trial or on appeal—have

Notwithstanding the long-recognized purpose of the Sixth Amendment in preventing an unfair trial, the *amici* law professors argue that the Sixth Amendment is instead intended to protect against any substantial deprivation of liberty before trial. In their *amicus* brief, the professors note that once counsel was appointed for Petitioner, the charges against him were dropped, but not before he spent "weeks in jail." *Amicus* Br. of Twenty-Four Professors of Law, at 2. The professors suggest that this case therefore "presents the Court with an opportunity to prevent such injustices in the future by clarifying its rule regarding when the Sixth Amendment right to counsel attaches" and urge the Court to adopt a rule that would not necessarily require appointment of counsel for a *Gerstein* hearing, but would require appointment of counsel "once the hearing is complete if the result is to impose an ongoing, significant restriction on the accused's liberty." *Id.*, at 2-4.

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often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor . . . . Such cases emphasize the defendant's need for counsel in order to obtain a *favorable* decision.") (internal citation omitted, italics original); *Gouveia*, 467 U.S., at 190 ("[T]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor . . . ."); *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984) ("In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.") (internal citations omitted); *United States* v. *Cronic*, 466 U.S. 648, 653-54 (1984) ("An accused's right to be represented by counsel is a fundamental component of our criminal justice system . . . . Without counsel, the right to a trial itself would be of little avail . . . .") (internal quotation omitted); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *Johnson*, 304 U.S., at 458.

The professors' contention that the right to counsel exists to protect against pretrial deprivations of liberty is contrary to the repeated holdings of this Court discussed above and, indeed, was squarely rejected by the Court in *Gouveia*.

In *Gouveia*, four inmates were convicted of murdering another inmate at a federal prison and two other inmates were convicted of another murder at the same facility. 467 U.S., at 182. The individuals were placed in administrative detention for extended periods of time (approximately nineteen months in one case and not less than seven months in the other) before counsel was eventually appointed. *Id.*, at 182-84. On appeal, the Ninth Circuit, sitting en banc, decided that the inmates had a Sixth Amendment right to an attorney while they were held in administrative detention prior to indictment. *Id.*, at 182. The Court "granted certiorari to review the Court of Appeal's novel application of our Sixth Amendment precedents," *id.*, and squarely rejected any argument that the Sixth Amendment right to counsel exists to protect an accused's liberty interests before trial:

> "The Court of Appeals departed from our consistent interpretation of the Sixth Amendment in these cases, and in so doing, fundamentally misconceived the nature of the right to counsel guarantee. We agree with the dissent that the majority's analogy to Sixth Amendment speedy trial cases is inapt. . . . The difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. *While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial*

> *right exists primarily to protect an individual's liberty interest,* 'to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" *Id.*, at 189-90 (quoting *United States* v. *MacDonald*, 456 U.S. 1, 6-7, 8 (1982)) (internal citations omitted) (emphasis added).

Thus, as *Gouveia* expressly held, the Sixth Amendment right to counsel exists not to protect against pretrial deprivations of liberty (other constitutional provisions such as the speedy trial right and due process address that concern), but rather serves an altogether different function: protecting an accused from unfair conviction as a result of ignorance of his legal and constitutional rights.

B. Consistent With Its Underlying Purpose, the Sixth Amendment Right to Counsel Attaches Only at or After the Initiation of Adversary Judicial Proceedings.

Given that the Sixth Amendment right to counsel exists to prevent the conviction of an accused as a result of his ignorance of his legal and constitutional rights, the question inevitably follows when counsel is necessary to protect this interest. The Court answered the question in *Kirby*, holding that an individual's "right to counsel attaches only *at or after* the time that adversary judicial proceedings have been initiated against him." 406 U.S., at 688 (emphasis added). This test begets yet another question: when adversary judicial proceedings commence.

As explained below, the answer depends upon when the government commits itself to prosecuting an individual.

C. The Fifth Circuit Correctly Held That Petitioner's Sixth Amendment Right to Counsel Did Not Attach at the Article 15.17 Magistration Because the State of Texas Was Not Committed to Prosecuting Petitioner.

1. The Government's Commitment to Prosecute Is a Necessary Element for the Initiation of Adversary Judicial Proceedings.

In *Gouveia*, the Court recognized that the "view that the right to counsel does not attach until the initiation of adversary judicial proceedings" is "consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecutio[n]' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves" including the "core purpose" of assuring "aid at trial 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" 467 U.S., at 188-89 (quoting *Ash*, 413 U.S., at 309).

Bearing that purpose in mind, the Court explained that when considering whether adversary judicial proceedings have begun and, accordingly, whether the right to counsel has attached, the determinative factor is the government's commitment to prosecute:

> "Thus, given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the

> initiation of adversary judicial proceedings 'is far from a mere formalism' . . . . *It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'*" *Gouveia*, 467 U.S., at 189 (quoting *Kirby*, 406 U.S., at 689) (emphasis added).

"It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Kirby*, 406 U.S., at 689-90.

The critical nature of the commitment to prosecute in determining whether the Sixth Amendment right to counsel has attached has been acknowledged by a number of the circuit courts. *See United States* v. *Hylton*, 349 F.3d 781, 787 (CA4 2003) (finding that "the statement of charges . . . did not commence formal prosecutorial proceedings to which the Sixth Amendment right of counsel attached"); *United States* v. *Alvarado*, 440 F.3d 191, 199-200 (CA4 2006) (noting that the "filing of a federal criminal complaint does not commence a formal prosecution" in concluding that the Sixth Amendment right to counsel did not attach upon the filing of the complaint); *Caver* v. *Alabama*, 577 F.2d 1188, 1195 (CA5 1978) ("[T]he relevant time is when 'the government has committed itself to prosecute' and 'a defendant finds himself faced with the prosecutorial forces of organized society'") (quoting *Kirby*, 406 U.S., at 689); *United States*

v. *McCauliffe*, 490 F.3d 526, 539 (CA6 2007) (noting that the Sixth Amendment right to counsel "does not attach until a prosecution is commenced . . .") (quoting *United States* v. *Cope*, 312 F.3d 757, 772 (CA6 2002); *United States* v. *Muick*, 167 F.3d 1162, 1165 (CA7 1999) ("When Muick's attorney requested that he be involved in all contact between Muick and the Customs agents, Muick had not yet been indicted. As there was no prosecution at that time, Muick's Sixth Amendment rights could not yet be invoked."); *Anderson* v. *Alameida*, 397 F.3d 1175, 1180 (CA9 2005) (holding the state court "reasonably concluded" petitioner's trial counsel's performance was sufficient even though trial counsel did not assert a Sixth Amendment claim because, the state court found, such a claim was "without merit" since a police investigator's filing of a complaint for an arrest warrant did not commit the district attorney to prosecute or, "[i]n other words, filing the complaint for an arrest warrant was not a prosecutorial act . . ." and therefore "a police inspector filing a complaint seeking an arrest warrant is not a critical stage that commits a prosecutor to trial"); *Lumley* v. *City of Dade City*, 327 F.3d 1186, 1195 (CA11 2003) ("[T]he Sixth Amendment right to counsel ordinarily does not arise until there is a formal commitment by the government to prosecute . . . .").

2. Federal Courts Look to State Law When Determining When Adversary Judicial Proceedings Began in State Court.

As noted by Petitioner, state criminal proceedings vary widely. Pet. Br., at 16. The event that commences adversary judicial proceedings may occur, for example, "by way of formal charge, preliminary hearing, indictment,

information, or arraignment." *Kirby*, 406 U.S., at 688-89. As such, federal courts look to state law to determine when adversary judicial proceedings begin. *See Moore* v. *Illinois*, 434 U.S. 220, 228 (1977) (noting that the "prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court" in arriving at its decision that his rights had attached at the time of the preliminary hearing); *Meadows* v. *Kuhlmann*, 812 F.2d 72, 77 (CA2 1987) (looking to New York law to determine when the prosecution commenced); *Beck* v. *Bowersox*, 362 F.3d 1095, 1101 (CA8 2004) (same as to Missouri); *Anderson* v. *Alameida*, 397 F.3d, at 1180 (same as to California). Therefore, Texas criminal procedure controls whether the government had committed itself to prosecute Petitioner, thus commencing adversary judicial proceedings and triggering the Sixth Amendment right to counsel.

3. The Fifth Circuit Correctly Held That, at the Time of the Article 15.17 Magistration, the State of Texas Had Not Committed Itself to Prosecute Petitioner and, Therefore, No Adversary Judicial Proceedings Had Begun.

Petitioner does not contend that adversary judicial proceedings commenced upon his arrest or his being booked into the Gillespie County Jail. Nor does Petitioner contend that he was entitled to a lawyer at the Article 15.17 magistration itself. Pet. Br., at 19-20 n.6. Rather, Petitioner ambiguously contends that his Sixth Amendment right to counsel attached some time "following" his Article 15.17 magistration before the

justice of the peace. Pet. Br., at 14.[2] However, because there was no commitment to prosecute at that time, adversary judicial proceedings had not been initiated and Petitioner's right to counsel had not attached.

Petitioner summarizes the proceedings at his Article 15.17 magistration as follows:

> "At Rothgery's initial appearance, the magistrate was presented with a sworn 'Affidavit of Probable Cause,' executed by the police officer who arrested Rothgery 'in the name and by the authority of the state of Texas,' 'charg[ing] that . . . Rothgery . . . commit[ted] the offense of unlawful possession of a firearm by a felon.' Pet. App. 33a. Based on the affidavit, the magistrate informed Rothgery that he was 'accused of the criminal offense of unlawful possession of a firearm by felon.' *Id.* at 35a. He also informed Rothgery of his right to appointed counsel and his right to an examining trial. *Id.* Finally, he set bail of $5,000 to ensure that Rothgery answered the accusation against him." Pet. Br., at 28.

Nothing in Petitioner's Brief establishes that the State of Texas was committed to prosecuting Petitioner as of the date of his Article 15.17 magistration. At best, Petitioner

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2. *See also* Fifth Circuit Record, at 343 (hereinafter "R. __"); Pet. Br., at 19-20 n.6 ("The question presented by this case . . . is the former: whether Rothgery's initial appearance before the magistrate marked the commencement of adversary judicial proceedings, *after* which his right to counsel attached.") (emphasis added). It is not clear how long "after" the initial appearance counsel must be appointed under Petitioner's interpretation of the Sixth Amendment.

has established only that he had been accused by a *peace officer* of committing a felony. However, as noted by the court of appeals, a peace officer has no legal authority to commit the State of Texas to prosecute Petitioner, and there is no evidence that any person with the authority to do so, that is, a prosecutor, had become involved in the matter at that time:

> "It is undisputed in this appeal that the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002. There is also no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor. *Compare* TEX. CODE CRIM. PROC. art. 2.13 (limiting the role of a police officer, in relevant part, to notifying the magistrate of an offense and arresting offenders), *with id.* arts. 2.01-.02 (designating district and county attorneys as the representatives of the state in all criminal cases and proceedings); *cf. Clawson* v. *Wharton County*, 941 S.W.2d 267, 272 (Tex. App.–Corpus Christi 1996, writ denied) (recognizing that 'the decision not to prosecute is the quintessential function of a prosecutor' (dash omitted))." *Rothgery* v. *Gillespie County*, 491 F.3d 293, 297 (CA5 2007).[3]

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3. *See also id.*, at 300-01 ("[T]he summary judgment evidence reflects no prosecutorial knowledge of or involvement in the arrest and magistrate appearance . . . .").

The Fifth Circuit correctly held that, given the absence of evidence of prosecutorial knowledge or involvement, the State of Texas had not commenced adversary judicial proceedings against Petitioner at the time of the Article 15.17 magistration and, therefore, Petitioner's Sixth Amendment right to counsel did not attach.[4]

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4. In a letter brief to the Fifth Circuit, filed at the invitation of the court, the Texas Office of the Attorney General submitted that the Texas "Court of Criminal Appeals has consistently correlated the initiation of adversary criminal proceedings with the involvement of a prosecutor. And for good reason, because only a prosecutor, not a peace officer, can commit the State to prosecute a felony offense." *See* April 20, 2007, Letter Brief at 11. The letter brief did note that in *Fuller* v. *State* the Texas Court of Criminal Appeals found that the right to counsel had attached at "the article 15.17 hearing." *Id.*, at 4 & n.10. However, *Fuller* is not dispositive on the issue of whether the Texas Court of Criminal Appeals would find that Petitioner's Article 15.17 magistration initiated adversary judicial proceedings for three reasons. First, in *Fuller*, the accused had already been charged with an offense. *See Fuller* v. *State*, 829 S.W.2d 191, 205 (Tex. Crim. App. 1992) (en banc). In contrast, Petitioner had not been formally charged by the time of his Article 15.17 magistration. *See Rothgery*, 491 F.3d at 300 (noting that a form used to memorialize the warnings given to Petitioner "indicated that charges 'will be filed' in the district court, not that they were being filed concurrently with the magistrate" and that "there is no basis to conclude that the use of the word 'charge' [in the probable-cause affidavit] was, or could have been anything but informal."); *see also* R. 343. Second, the *Fuller* court stopped short of making a final determination on this issue, finding only that the defendant "is *probably* right to insist that an effective waiver of counsel under the Sixth Amendment was essential to the admissibility of his ensuing statements," 829 S.W.2d, at 205 (emphasis added), but holding that the statements were nevertheless admissible because he had effectively relinquished or abandoned the right to counsel, *id.* Third, and most importantly, in a case decided nearly two years after the *Fuller* decision, the Texas Court of Criminal Appeals stated that it had "made it clear that an arrest alone does not trigger adversarial

The Fifth Circuit's decision is wholly consistent with the purpose and intent of the Sixth Amendment to protect the criminal defendant from the danger of erroneous conviction as a result of his ignorance of the law. Nothing happened prior to or during the Article 15.17 magistration that could fairly be considered an event that "could settle [Petitioner's] fate and reduce the trial itself to a mere formality," *Gouveia*, 467 U.S., at 189—and indeed Petitioner does not even attempt to make such an argument. The Fifth Circuit correctly affirmed the district court's order granting summary judgment to Gillespie County.

II. *BREWER* AND *JACKSON* ARE NOT DISPOSITIVE OF WHETHER ROTHGERY'S SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHED AT THE ARTICLE 15.17 MAGISTRATION.

Petitioner erroneously contends that the question presented in this case—whether Petitioner's Sixth Amendment right to counsel attached following the Article 15.17 magistration, given the absence of a commitment by the government to prosecute Petitioner—was actually "settled" years ago by the Court in *Brewer* and *Jackson*. But *whether* the right to counsel had attached was not at issue in either of those cases. Hence, *Brewer* and *Jackson* do not control the outcome of this case.

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judicial proceedings, with or without a warrant, *nor does an Article 15.17 warning. . . .*" *Green* v. *State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994) (en banc) (emphasis added) (noting that in a different case adversarial judicial proceedings were found to have "begun by the time of Article 15.17 warnings because by then unspecified 'charges' had been filed against defendant").

In both *Brewer* and *Jackson* the Court considered whether the defendants—whose Sixth Amendment right to counsel had "no doubt" attached, *Brewer*, 430 U.S., at 399—had waived their rights to be interrogated by the police. *See also Jackson*, 475 U.S., at 629 ("The question is not whether respondents had a right to counsel at their postarraignment custodial interrogations. The existence of that right is clear . . . . The question in these cases is whether respondents validly waived their right to counsel at the postarraignment custodial interrogation.").

In *Brewer*, an arrest warrant had been issued for the defendant, he had been arraigned, and committed to jail prior to making incriminating statements. 430 U.S., at 390-93, 399. Similarly, the defendants in *Jackson* had been arrested, arraigned, and apparently retained in police custody prior to the custodial interrogation at issue. 475 U.S., at 627-28. With little analysis, and with the simple observation that the defendants had each been "arraigned," the Court quickly concluded that the right to counsel had attached for each defendant (indeed, as to all defendants but one, the State conceded that it had) and moved on to the question of waiver. *Jackson*, 475 U.S., at 627-28; *Brewer*, 430 U.S., at 399.

Nonetheless, Petitioner contends that these cases establish that a person who is arrested and taken before a judge to hear the accusations against him and is then required to remain in jail or post bail is entitled to the protection of the Sixth Amendment. Pet. Br., at 21-24. Petitioner asserts that in *Jackson* the Court held that an individual's right to counsel attaches the moment that a person who was previously a "suspect" becomes an "accused." Pet. Br., at 3. Attempting to draw similarities

between the facts of his case and those in *Brewer* and *Jackson*, Petitioner claims that he falls into the category of "accused" because he was "accused" of a criminal offense at the Article 15.17 magistration and remanded to bail. Pet. Br., at 11-12.

Brewer and *Jackson* did not hold that a person in Petitioner's circumstances, that is, a person accused by a peace officer of committing an offense for purposes of establishing probable cause, would be an "accused." Rather the Court recognized in *Jackson* that a person is transformed from a "suspect" to an "accused" "*after a formal accusation has been made.*" *Jackson*, 475 U.S., at 632 (emphasis added); *see also id.*, at 631 ("In *United States* v. *Gouveia*, we explained the significance of the *formal accusation*, and the corresponding attachment of the Sixth Amendment right to counsel . . . .") (emphasis added); *id.* at 632 ("As a result, the 'Sixth Amendment guarantees the accused, at least after the initiation of *formal charges*, the right to rely on counsel . . . .") (emphasis added). As noted, *supra* note 4, formal charges had not been filed at the time of Petitioner's Article 15.17 magistration. And as has been explained, only a prosecutor can commit the State of Texas to prosecute a felony offense, and at the time of Petitioner's Article 15.17 magistration, there is no dispute that that had not happened yet.

Nor did *Brewer* and *Jackson* address the significance of the defendants' appearances before a judge or the setting of bail. The Court did not linger on the varying types of hearings that might conceivably be called "arraignments," and the Court made no comment on whether there had been prosecutorial involvement in any of the cases.

Rather, it appears that the Court was satisfied that the defendants' "arraignment" indicated the initiation of adversary judicial proceedings because an "arraignment" is one of the events expressly identified in *Kirby* as triggering the Sixth Amendment right to counsel. *Jackson*, 475 U.S., at 629 ("The arraignment signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment . . . .") (quoting *Gouveia*, 467 U.S., at 187) and 630 n.3 (citing *Kirby*, 406 U.S., at 689 and twice emphasizing "arraignment"); *Brewer*, 430 U.S., at 399.

Brewer and *Jackson* did not—contrary to Petitioner's assertions—hold that appearance before a justice of the peace for statutory warnings and the setting of bail necessarily invokes the Sixth Amendment right to counsel in every instance. Instead, both opinions, in but a few passing sentences, deemed it obvious that a formal "arraignment" commenced adversary proceedings.

But if an "arraignment" is to be accorded talismanic force, then it bears emphasis that, under Texas law, it is indisputable that Petitioner had yet not been arraigned. By statute, an "arraignment" under Texas law "takes place for the purpose of fixing [the defendant's] identity and hearing his plea." TEX. CODE CRIM. PROC. art. 26.02. Moreover, the arraignment in Texas typically takes place after the indictment. *Id.* art. 26.03. In contrast, an Article 15.17 magistration takes place before indictment and requires no entry of a plea. It bears none of the qualities of an arraignment under Texas law.

Black's Law Dictionary defines "arraignment" as,

> "[t]he initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges *and to enter a plea*." BLACK'S LAW DICTIONARY 104 (7th ed. 1999) (emphasis added).

That is surely the primary definition of the word. Petitioner urges that "arraignment" can also be used in some States to refer to proceedings that resemble an Article 15.17 magistration, Pet. Br., at 20-21 & n.7, but it is noteworthy that the Black's definition makes no such mention. Indeed, it expressly contrasts "arraignment" with "preliminary hearing" and "initial appearance," using a "cf." signal to reflect the difference between the terms. BLACK'S LAW DICTIONARY, at 104.

And Texas law does not equate an Article 15.17 magistration with an arraignment. Indeed, several differences are evident. *First*, as detailed in Respondent's brief, the Texas proceeding is essentially administrative, providing the arrestee with various forms and statutory warnings. *See* Resp. Br., at 4-7.[5] *Second*, an Article 15.17 magistration is non-adversarial. Indeed, unlike an arraignment, the prosecutor is typically not even there (and, in this case, was both absent and unaware of the proceeding). And *third*, Petitioner entered no plea (nor could he) and was required to preserve no defenses that could prejudice him at later trial.

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5. Although the magistrate's determination of probable cause is not itself administrative, this Court has expressly held that a probable-cause hearing does not require the appointment of counsel under the Sixth Amendment. *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975).

Petitioner avoids these obvious distinctions by asserting that his Article 15.17 magistration was "functionally identical to the proceedings in *Brewer* and *Jackson*." Pet. Br., at 27. As an initial matter, the precise contours of the proceedings in *Brewer* and *Jackson* are ambiguous at best. *See* Resp. Br., at 34-38. Neither opinion considered the issue at any length; both simply applied the syllogism "arraignment" equals "initiation of adversary proceedings." Under the terms of that abbreviated logic, the obverse should also obtain: "not arraignment" should equal "not the initiation of adversary proceedings."

But, even assuming Petitioner's assertion were true, that the Court had concluded in *dicta* that the right to counsel attaches at probable-cause hearings (and the better reading of those opinions is that it did not), the Court would not now be bound by those earlier statements—especially because the question of when the right attached was largely uncontested in both cases. As the Court noted regarding *Brewer* in *Texas* v. *Cobb*, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." 532 U.S. 162, 169 (2001) (citing *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974)).

On any fair reading, *Brewer* and *Jackson* do not resolve the question presented in this case.

III. EVEN IF ADVERSARY JUDICIAL PROCEEDINGS HAD COMMENCED AT THE ARTICLE 15.17 MAGISTRATION, PETITIONER WAS NOT ENTITLED TO THE ASSISTANCE OF COUNSEL UNTIL A "CRITICAL STAGE" OCCURRED.

If the Court were to disagree with the Fifth Circuit's reliance on prosecutorial involvement to determine the onset of adversary judicial proceedings in Texas, the Court should nonetheless affirm because Petitioner was not, in any event, denied his Sixth Amendment right to counsel. The Court has made clear that the right to counsel requires both attachment *and* a "critical stage" in the prosecution. Without the latter, the supposed attachment of Petitioner's right to counsel remains purely academic, and the Fifth Circuit's ultimate conclusion that Petitioner was not denied that right is entirely correct.

Petitioner would rather this Court not address the critical stage issue, *see* Pet. Br., at 19-20 n.6, understandably so, since he cannot seriously argue that he was required to participate in a critical stage without assistance of counsel. However, Petitioner cannot establish that his Sixth Amendment right to counsel was violated without such a showing. The Court's decisions demonstrate that although a defendant may have the right to counsel, that right is not actionable by itself. There must be a "critical stage" of the prosecution at which the Sixth Amendment applies. *Jackson*, 475 U.S., at 629-30; *Gouveia*, 467 U.S., at 189; *Moore*, 434 U.S., at 229; *Brewer*, 430 U.S., at 400; *Wade*, 388 U.S., at 226-27. Indeed, in *Brewer*, the Court was careful to point out that even though it had concluded that the defendant's right to counsel had "no doubt" attached, 430 U.S., at 399, the

protection of the Sixth Amendment would not have come into play at all in the absence of a critical stage—in that case, the interrogation, *id.*, at 400. Similarly, in *Wade*, the Court noted that a denial of a right to have counsel present at such stages as a "systemized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like" would not "violate the Sixth Amendment; they are not critical stages since there is a minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." *Wade*, 388 U.S., at 228-29. Without a critical stage, therefore, the Sixth Amendment right to counsel is simply not implicated.[6]

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6. Petitioner obliquely contends that this Court should not consider the "critical stage" issue because Respondent did not press the issue before the court of appeals and because the Fifth Circuit rejected Petitioner's claim on a separate ground. Pet. Br., at 19-20 n.6. But this Court reviews judgments, not statements in opinions, *California* v. *Rooney*, 483 U.S. 307, 311 (1987), and the judgment of the Fifth Circuit was that Petitioner's Sixth Amendment right to counsel had not been violated. Any contrary judgment would necessitate the conclusion that his right to counsel had been denied during a critical stage in the proceedings, and there is no serious argument on these facts that that occurred. *Cf. Rumsfield* v. *Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006) (internal quotation omitted) (noting that the Court's review "may, in our discretion, encompass questions fairly included within the question presented" and choosing to consider an argument presented by *amici* in spite of the government's claim that "this question was not before the Court because it was neither included in the questions presented or raised by FAIR"); *United States* v. *Mendenhall*, 446 U.S. 544 (1980) ("While the Court ordinarily does not consider matters neither raised nor decided by the courts below . . . it has done so in exceptional circumstances. . . . We consider the Government's contention . . . because the contrary assumption . . . rests on a serious misapprehension of federal constitutional law. And because the

The Court has defined "critical stages" as those events at which the criminal defendant "is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Gouveia*, 467 U.S., at 189 (internal quotations eliminated). Aside from police interrogation, the Court has concluded that a preliminary hearing at which the defendant entered a plea, an arraignment at which certain pleas could be lost, a psychiatric examination, and a post-indictment lineup are critical stages of the prosecution at which the right to counsel would attach. *See, e.g., Estelle* v. *Smith*, 451 U.S. 454, 470 (1981) (finding that a psychiatric examination in a capital case "proved to be a 'critical stage' of the aggregate proceedings against respondent"); *Moore*, 434 U.S., at 229) (finding a right to counsel at a preliminary hearing at which a victim identified the defendant); *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970) (finding right to counsel had attached at a preliminary hearing in which the State put on evidence of its case); *Wade*, 388 U.S., at 218, 227 (holding that a post-indictment lineup was a "critical stage"); *White* v. *State of Maryland*, 373 U.S. 59, 60 (1963) (holding that a preliminary hearing was a critical stage because the defendant entered a plea); *Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961) (finding that an arraignment is a critical stage because the rights to certain pleas, including insanity, may be lost). Petitioner's Article 15.17 magistration does not resemble

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determination is essential to the correct disposition of other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.") (internal citations omitted).

any of those events. Petitioner was not formally charged at the appearance, he was not required to enter a plea or make any other compromising statements, and was never confronted by his adversary—the prosecutor.

The Court's limitation of the right to counsel to such critical stages is consistent with the Sixth Amendment's purpose of protecting an accused from conviction as a result of his ignorance of his rights and makes imminent practical sense. Indeed, the Court has never suggested that States must provide attorneys to indigent defendants around the clock, nor could they reasonably do so.

Moreover, without the critical-stage limitation it would be impracticable to determine the point at which a violation of the Sixth Amendment right to counsel had occurred. For example, in Petitioner's case, he is studiously vague as to when he believes such a violation occurred. He concedes that he was not entitled to counsel *at* his Article 15.17 magistration. Pet. Br., at 19-20 n.6. Instead, he argues instead that he was entitled to appointed counsel some time "after" that proceeding. *Id.* When precisely, Petitioner does not say.

Nor for what purpose. Petitioner was released on bond following his Article 15.17 magistration and was free on bond until his indictment issued some six months later. During that time, not only did he face no critical stages, he faced no stages whatsoever. The only possible purpose to which Petitioner alludes is that counsel might have discovered that his California felony charges had ultimately been dismissed, and Petitioner presumably

might have avoided indictment altogether.[7] But that

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7. Some six months after his Article 15.17 magistration, Petitioner was indeed indicted for unlawful possession of a firearm by a felon, a third-degree felony. R. 340; TEX. PENAL CODE §46.04. Once Petitioner's counsel was appointed, he successfully argued that the Texas charge should be dismissed because Rothgery's Calfornia convictions had been dismissed through completion of a diversionary program, and, thus, strictly speaking, he was no longer a "felon." R. 436, 593.

There is no dispute, however, that Petitioner had committed two prior felonies, and his record shows two California felony convictions for possession of a controlled substance. *See* Superior Court of California, County of Orange, Case Number 96SFO443, at http://visionweb.occourts.org/Vision_Public/DisplayCaseInfo.do (last visited Feb. 21, 2008). After completing a diversionary program, California law allowed him to petition the court to withdraw his guilty plea and have the case against him dismissed. R. 462, 593. The California statute authorizing this procedure, California Penal Code section 1203.4(a), is not technically an expungement statute because it does not erase the conviction from a defendant's record. As one California court explained, "while a number of courts have used forms of the word 'expunge' to describe the relief made available by section 1203.4 . . . the statute does not in fact produce such a dramatic result. . . . The statute does not purport to render the conviction a legal nullity." *People* v. *Frawley*, 82 Cal. App. 4th 784, 791 (Cal. Ct. App. 2000).

And, even though the statute does remove certain disabilities and penalties, it does not qualify those who have committed felonies to carry firearms. CAL. PENAL CODE §1203.4(a) ("Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Section 12021."); *see also People* v. *Bell*, 49 Cal. 3d 502, 546 (Cal. 1989) ("[T]he Legislature . . . specifically declare[d] that dismissal of a charge [under §1203.4] after completion of probation does *not* permit the person to own or possess a . . . firearm."). Thus, if Petitioner had engaged in the identical conduct in California that he did in Texas, he would have committed a felony under California law. CAL. PENAL CODE §12021(a)(1) (prohibiting felons from possessing firearms).

putative purpose has been explicitly rejected by this Court:

> "[I]t may well be true that in some cases preindictment investigation could help a defendant prepare a better defense. But, as we have noted our cases have never suggested that the purpose of the right to counsel is to provide a defendant with a *preindictment private investigator*, and *we see no reason to adopt that novel interpretation* of the right to counsel in this case." *Gouveia*, 467 U.S., at 191 (emphasis added).

Aside from hoping for a "preindictment private investigator," Petitioner suggests no purpose for which counsel might have served during the months he remained free and unindicted.

Thus, under Petitioner's theory, the Sixth Amendment requires that counsel have been appointed at an indeterminate time "after" his probable-cause hearing, for an indeterminate purpose, irrespective of any critical stages or further proceedings in the case.

The Constitution contains no such mandate. And state and local governments should not be confronted with such an amorphous and all-encompassing obligation. Petitioner's right to a fair trial was fully protected—and that is all that the Sixth Amendment right to counsel requires.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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